COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 022981-00**

Charles Johnson	Employee
Washington Park Corp.	Employer
T.I.G. Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, McCarthy and Carroll)

APPEARANCES
John F. Trefethen, Jr., Esq., for the employee
Robert J. Riccio, Esq., for the insurer at hearing
James W. Stone, Esq., for the insurer on appeal

COSTIGAN, J. The insurer appeals from an administrative judge's decision ordering it to pay the employee a $10,000 penalty pursuant to G. L. c.152, § 8(1),[1] for failing to timely pay § 50[2] interest due on a prior award of weekly benefits, but not explicitly ordered by the prior hearing decision. Following our decision in Megazzini v. Bell Atlantic, 19 Mass. Workers' Comp. Rep. 167 (2005), we reverse the judge's decision as contrary to law and vacate the § 8(1) penalty award.

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[1] General Laws c. 152, § 8(1), as amended by St. 1991, c. 398, § 23, provides for escalating penalties if the insurer fails to make "all payments due an employee *under the terms of* an order, *decision*, arbitrator's decision, approved lump sum or other agreement . . . within [certain time frames] of the insurer's receipt of such document. . . ." (Emphasis added.) If the insurer fails to make payments within ninety days of its receipt of such document, the § 8(1) penalty is $10,000.

[2] General Laws c. 152, § 50, as amended by St. 1991, c. 398, § 77, provides, in pertinent part:

> Whenever payments of any kind are not made within sixty days of being claimed by an employee . . . and *an order or decision requires that such payments be made, interest* at the rate of ten percent per annum of [sic] all sums due from the date of receipt of the notice of claim by the department to the date of payment *shall be required by such order or decision*. . . .

(Emphasis added.)

We set forth only the pertinent procedural history. On June 28, 2002, prior to the filing of the penalty claim at issue here, the same administrative judge filed a hearing decision awarding the employee retroactive § 34 and ongoing § 35 weekly incapacity benefits. Neither party appealed the decision or requested an amended hearing decision as to the issue of § 50 interest. The insurer timely paid the employee the weekly incapacity benefits ordered, but did not pay interest. Thereafter the employee wrote to the insurer twice, requesting payment of interest, but he received no satisfaction. On October 16, 2002, the employee filed a claim for the unpaid § 50 interest and for a $10,000 penalty pursuant to § 8(1). Prior to the §10A conference on those claims, the insurer paid the § 50 interest due, but as that payment came more than six months after the original hearing decision, the case proceeded to conference on the employee's penalty claim. (Dec. 3, 4.)

At conference, the judge joined the employee's § 13A claim for an attorney's fee and the insurer's § 14 claim, which asserted the employee's penalty claim was brought without reasonable grounds. The judge denied both parties' claims, but only the employee appealed to a de novo hearing.[3] The case was tried on an "Agreed Statement of Facts" relative to the § 8(1) penalty issue. (Dec. 1, 2.)

At hearing, the insurer's argument in chief was that no § 8(1) penalty was due because the 2002 hearing decision did not explicitly require it to pay § 50 interest. The judge disagreed:

> I find that the self-operative nature of § 50 required the insurer in this instance to pay § 50 interest in a timely manner even though it was not specifically ordered to do so. The Section is self-operative and does not require a specific order. . . . The order of payment [sic] triggered an obligation to pay § 50 interest in a timely manner, but the insurer failed to

[3] Even though the insurer had not appealed the conference denial of its § 14 claim, the judge apparently considered the claim properly before him. Consistent with his award of the § 8(1) penalty, the judge denied and dismissed the insurer's claim for costs and penalties under § 14. (Dec. 6.) The insurer on appeal does not challenge that aspect of the judge's decision. Accordingly, we deem the issue waived.

> do so. I find this to be a violation of § 8(1) and the insurer is therefore liable to the employee for a penalty payment of $10,000.

(Dec. 5.)

Although the judge did not have the benefit of our June 2005 decision in Megazzini, supra, when he filed his decision in December 2004, we had already addressed an issue closely related to that raised by the employee's penalty claim. In Cruthird v. City of Boston Health and Hosp. Dept., 17 Mass. Workers' Comp. Rep. 421, 423 (2003), we held that even though § 34B cost-of-living adjustments, by statute, were to be paid "without application," a § 10A conference order, which awarded § 34A permanent and total incapacity benefits but did not include a specific order of COLA benefits, did not subject the insurer to § 8(1) penalties when it did not pay COLA benefits in a timely fashion. "Thus, having timely paid the § 34A weekly benefits which were ordered, there was no other term with which the self-insurer failed to comply so as to render it subject to a § 8(1) penalty." Id.[4]

We acknowledge that § 50 interest differs from § 34B COLA benefits, in that "the employee need do nothing in order to receive interest on unpaid compensation due." Drumm v. Viale Florist, 16 Mass. Workers' Comp. Rep. 335, 337 (2004). Endorsing the approach taken by the administrative judge, the employee argues that the self-operative nature of § 50, see Le v. Boston Steel & Mfg. Co., 14 Mass. Workers' Comp. Rep. 75 (2000), required the insurer to pay interest even without an explicit award in the first hearing decision.[5] That argument is disposed of in Megazzini:

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[4] See also, Pacellini v. Cape Cod Fireplace Shop, 17 Mass. Workers' Comp. Rep. 394 (2003)(where decision did not specifically order reimbursement of § 11A(2) appeal fee to prevailing employee, § 8(1) penalty did not attach to insurer's failure to reimburse).

[5] In Drumm, supra, we held that an employee may request interest "in a separate, subsequent § 10 claim," as the employee did here. Cf. Charles v. Boston Family Shelter, 11 Mass. Workers' Comp. Rep. 203, 205 (1997)(request for § 50 interest should have been made either via a timely request for an amended decision or by way of an appeal of the original decision).

> [B]y itself, the self-operative nature of § 50 does not trigger the requirement for an assessment of penalties pursuant to § 8(1). The plain language of § 8(1) requires that a penalty be assessed only where an insurer fails to make payments due *under the terms of an order or decision*. If the order or decision does not specify that payment is due pursuant to § 50, or any other statute, no § 8(1) penalty may be assessed for failure to make such payment.

Supra at 168 (emphasis in original).

It bears repeating that "penalty statutes must be narrowly applied," Collatos v. Boston Retirement Bd., 398 Mass. 684, 686 (1986), and strictly construed. Delano v. Milstein, 56 Mass. App. Ct. 923 (2002). Thus, "[a] § 8(1) 'document' [here, the 2002 decision] must be unequivocal in its terms in order to fairly impose the threat of a penalty for nonpayment." Cruthird, supra at 424. The self-operative nature of § 50[6] cannot substitute for an explicit order that § 50 interest is due on weekly benefits awarded in a conference order or hearing decision, so as to trigger a penalty pursuant to § 8(1). Cf. Favata v. Atlas Oil Corp., 12 Mass. Workers' Comp. Rep. 12 (1998)(reviewing board ordered § 8(1) penalty where insurer failed to comply with conference order awarding § 50 interest).[7]

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[6] Though we base our decision on the plain meaning of § 8(1), we agree with the insurer that the legislative history of § 50 is relevant. The 1991 amendment to § 50 -- providing that interest "shall be required by such order or decision," -- imposes a clear burden on the administrative judge (or the reviewing board) to specifically award interest. By contrast, the pre-1991 version of § 50 stated that interest "shall be paid by the insurer." " 'The legislature are presumed to understand and intend all consequences of their own measures . . . .' " Rambert v. Commonwealth, 389 Mass. 771, 774 (1983), quoting Spaulding v. McConnell, 307 Mass. 144, 149 (1940). The language of the 1991 version of § 50 correlates with the language of § 8(1), amended at the same time, in that § 50 requires a judge to award interest in the order or decision, and § 8(1) looks to the terms of that order or decision to determine whether there has been a failure to pay, and thus a penalty due. Accordingly, without an accompanying order or decision, the "self-operative" nature of § 50 interest does not entitle the employee to a § 8(1) penalty when the insurer does not pay interest.

[7] To the extent prior decisions construing § 50 have suggested that § 8(1) penalties may be due in the absence of a specific order of interest, the facts of this case are distinguishable. See, e.g., Taylor v. Morton Hosp. & Med. Ctr., 16 Mass. Workers' Comp. 30 (2004)(reviewing board awarded § 8(1) penalty where insurer did not dispute

Our holding does not mean that we condone the insurer's dilatory approach to the payment of interest:

> [T]he failure of an order or decision to specify that payments are due does not absolve an insurer . . . from compliance with a statute that is self-operative. Failure to comply with such a statute without reasonable grounds could subject the insurer . . . to penalties pursuant to G. L. c. 152, § 14(1)."

Megazzini, supra at 168 n.3. See also Cruthird, supra at 424 n.3.

We reverse the administrative judge's decision as contrary to law and vacate the award of the $10,000 § 8(1) penalty. Because the employee now has not prevailed, we also vacate the award of a § 13A(5) attorney's fee.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

Filed: **December 29, 2005**

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§ 50 interest was due or claim it made timely payment, and insurer had waived its only defense that employee failed to comply with procedural requirement of regulations).